

BEFORE THE STATE OF MONTANA  
 SUPERINTENDENT OF PUBLIC INSTRUCTION  
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EMILY A. GEHRING,	)	
Appellant,	)	OSPI 23-82
-vs-	)	
SCHOOL DISTRICT #27, LIBERTY	)	<u>DECISION AND ORDER</u>
COUNTY, MONTANA	)	
Respondent.	)	
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This is an appeal by Emily A. Gehring, hereinafter referred to as Appellant. Appellant is a nontenured teacher. Appellant's teaching contract was not renewed for the 1982-83 school year by the Liberty County School District #27 Board of Trustees, hereinafter referred to as the Board. The Board gave Appellant timely notice pursuant to Section 20-4-206 MCA that they would not renew her teaching contract. Appellant requested reasons for her nonrenewal, and the Board stated the reasons in writing.

Appellant disputed the nonrenewal and requested a hearing before the Liberty County Superintendent of Schools. The County Superintendent of Schools requested that written briefs be submitted by the parties to clarify whether the County Superintendent could assume jurisdiction in the matter and hold a hearing. Briefs were submitted.

On June 24, 1982, an Order was issued by the County Superintendent denying the hearing because "Petitioner has not alleged any violation of any law, duty or rule applying to the trustees. Therefore, it is the opinion of the undersigned (County Superintendent) that no legal controversy has been established for which a hearing can be held."

The County Superintendent denied a hearing to the nontenured teacher's nonrenewal of her contract. It is from that Order that Appellant appeals her case to this State Superintendent.



The sole issue on appeal as provided in the Notice of Appeal of Appellant, is:

Whether the decision of the County Superintendent to not grant Appellant a hearing is contrary to Section 20-3-210, MCA, and denies Appellant due process guaranteed her by both the United States and Montana Constitution, and is based on error of fact and law.

Appellant presents both a statutory and a constitutional claim for a due process hearing right before a County Superintendent. However, in Appellant's reply brief (page 6 and 7), responding to a constitutional argument presented by Respondents, Appellant states:

The argument of the Appellant is that her dismissal gives rise to controversy under Title 20 in the procedure of her termination and thus she has a right to a hearing under Section 20-3-210 MCA. No one has ever mentioned the words just cause or due process.

Respondent School Board cites Board of Regents v. Roth, 408 US 564 (1972). Appellant is not arguing a due process right under the Constitution. Rather, she is arguing a statutory right. Thus, there is no need to get into the Roth argument.

Appellant has further limited the issue on review in this appeal from the original issue presented in the Notice of Appeal to the State Superintendent. The issue for purposes of this appeal is whether there is a statutory right for a nontenured teacher whose contract has not been renewed by a board of trustees for a due process hearing before the county superintendent of schools.

The following statutes are relevant for examination:

Section 20-4-206. Notification of nontenure teacher reelection --acceptance -- termination and statement of reason. (1) The trustees shall provide written notice by April 15 to all nontenure teachers who have been reelected. Any nontenure teacher who does not receive notice of reelection or termination shall be automatically reelected for the ensuing school fiscal year.

(2) Any nontenure teacher who receives notification of his reelection for the ensuing school

fiscal year shall provide the trustees with his written acceptance of the conditions of such reelection within 20 days after the receipt of the notice of reelection. Failure to so notify the trustees within 20 days may be considered nonacceptance of the tendered position.

(3) When the trustees notify a nontenure teacher of termination, the teacher may within 10 days after receipt of such notice make written request of the trustees for a statement in writing of the reasons for termination of employment. Within 10 days after receipt of the request, the trustees shall furnish such statement to the teacher.

(4) The provisions of this section shall not apply to cases in which a nontenure teacher is terminated when the financial condition of the school district requires a reduction in the number of teachers employed and the reason for the termination is to reduce the number of teachers employed.

Section 20-3-210. Controversy appeals and hearings.

(1) Except as provided under 20-3-211, the county superintendent shall hear and decide all matters of controversy arising in his county as a result of decisions of the trustees of a district in the county. When appeals are made under 20-4-204 relating to the termination of services of a tenure teacher under 20-4-207 relating to the dismissal of a teacher under contract the county superintendent may appoint a qualified attorney at law to act as a legal adviser who shall assist the superintendent in preparing findings of fact and conclusions of law. Subsequently, either the teacher or trustees may appeal to the superintendent of public instruction under the provisions of appeal of controversies in this title. Furthermore, he shall hear and decide all controversies arising under:

(a) section 20-5-304 or 20-5-311 relating to approval of tuition applications; or

(b) any other provision of this title for which a procedure for resolving controversies is not expressly prescribed. (emphasis supplied)

In comparison, for purposes of this Decision and Order, on renewal of a tenure teacher, the relevant statutes are as follows:

20-4-204. Termination of tenure teacher services. (1) Whenever the trustees of any district resolve to terminate the services of a tenure teacher under the provision of 20-4-203(1), they shall, before April 1, notify such teacher of such termination in writing by certified or registered letter or by personal notification for which a signed receipt is returned. Such

notification shall include a printed copy of this section for the teacher's information.

(2) Any tenure teacher who receives notice of termination may request, in writing 10 days after the receipt of such notice, a written statement declaring clearly and explicitly the specific reasons for the termination of his services, and the trustees shall supply such statement within 10 days after the request.

(3) Within 10 days after the tenure teacher receives the statement of reasons for termination, he may request in writing a hearing before the trustees to reconsider their termination action. When a hearing is requested, the trustees shall conduct such a hearing and reconsider their termination action within 10 days after the receipt of the request for a hearing. If the trustees affirm their decision to terminate the teacher's employment, the tenure teacher may appeal their decision to the county superintendent who may appoint a qualified attorney at law as legal adviser who shall assist the superintendent in preparing findings of fact and conclusions of law.

(4) Subsequently, either the teacher or the trustees may appeal to the superintendent of public instruction under the provision for the appeal of controversies in this title.

Appellant's argument is that the nonrenewal of the teaching contract is a termination of employment. Since this is a dispute or "controversy" between a teacher and a school district, such controversy must be resolved pending a hearing before the county superintendent of schools pursuant to 20-3-210 MCA. Appellant further argues that the termination of a contract is an employment right and therefore taking that employment right away, regardless of whether a tenure or a nontenure teacher is involved, must allow a nontenured teacher a right to the administrative remedies as provided in school controversy statutes of Montana school law.

An examination of a teacher's contract is in order. Before employment can be terminated, employment must exist. Employment of a public school teacher, such as Appellant herein, must be accomplished by contract.

Section 20-4-201. Employment of teachers and specialists by contract. (1) The trustees of any district shall have the authority to employ any person

as a teacher or specialist, but only a person who holds a valid Montana teacher or specialist certificate or for whom an emergency authorization of employment has been issued that qualifies such person to perform the duties prescribed by the trustees for the position of employment. Each teacher or specialist shall be employed under written contract and each contract of employment shall be authorized by a proper resolution of the trustees and shall be executed in duplicate by the chairman of the trustees and the clerk of the district in the name of the district and by the teacher or specialist.

(2) No contract of employment with a teacher or specialist shall require such teacher or specialist to teach more than 5 days a week or on any holiday recognized by 20-1-305. No deduction shall be made from a teacher's or specialist's salary by reason of the fact that a holiday falls on a school day. Any teacher's or specialist's contract made in conflict with the 5-days-per-week provision of this section shall not be enforceable against the teacher or specialist.

(3) Whenever the trustees of a county high school and the trustees of the elementary district where the county high school is located form a joint board of trustees under the provisions of 20-3-361, such joint board of trustees may execute a contract of employment with a teacher or specialist who shall serve both districts. When such a contract is executed, the two districts shall prorate the compensation provided by such contract on the basis of the total number of instructional hours expended by such teacher or specialist within each district.

(4) Any contract executed under the provisions of this section may contain the oath or affirmation prescribed in 20-4-104, and the teacher or specialist shall subscribe to such oath or affirmation before an officer authorized by law to administer oaths.

The Board's relationship to a nontenured teacher is by written contract. The written contract specifies the terms and conditions of both parties. Section 20-4-201 provides several limitations on what may be required of a teacher in the contract. A contract exists for the term specified within the contract. Once a term has expired, the contract for that specific year also ends. A teaching contract, therefore, serves several purposes, including satisfaction of the requirements of 20-4-201 MCA.

The Board has no obligation to renew Applicant's teaching contract. Appellant had not received tenure.

Section 20-4-203, MCA provides that a teacher does not obtain tenure until he or she accepts a teachers contract for the fourth consecutive year. Once tenure has been achieved, then the relationship between these contracting parties takes on a new dimension. This State Superintendent has repeatedly ruled that a tenure teacher is entitled to more protections by statute than was afforded in the contract as to a nontenured teacher. Tenured rights cannot be lessened by allowing the nontenured teacher status to elevate to that of a tenure teacher. See Jones v. Ravalli County School District No. 15-6, OSPI #19-82, In the Matter of the Appeal of Kisling, OSPI #14-81, In the Matter of Appeal of Clyde Knudson, State ex rel. Saxtorph v. District Court 128 Mont. 352, 275 P2d 209 (1954).

A nontenured teacher has an additional statutory right. The right is one of renewal. Section 20-4-206 provides that trustees shall provide written notice by April 15 to all nontenured teachers who have been re-elected. Any nontenured teacher who does not receive notice of reelection or termination shall be automatically reelected for the ensuing school fiscal year.

The nontenured teacher, therefore, has no obligation to renew a written contract between the teacher and the board. The board has a statutory obligation to choose reelection or nonrenewal. If they fail to do either, then the teacher by statute is automatically reelected for the ensuing school year.

When a board chooses not to renew the contract of a teacher, they cannot secure the services of that teacher. The statute requires employment by written contract. Failure to issue a new written contract and notice of such action terminates the services of a teacher for that particular school district. The teacher is not entitled to a termination of employment status at nonrenewal. Termination of a nontenured teachers employment status is accomplished by 20-4-207 MCA. The renewal of a written

contract provides reemployment of a nontenured teacher. Nonrenewal provides no reemployment. The dismissal of any teacher pursuant to 20-4-207 MCA under contract provides an abrupt end or termination of services within the term or period of the contract of the teacher between the teacher and the school district. That action constitutes termination of employment, with appropriate due process recourse.

The Montana Supreme Court in Wibaux Education Association v. Wibaux County High School, \_\_\_\_ Mont. \_\_\_\_ 573 P2d 1162 (1978) recognized that the continuation of a nontenured teacher's employment from year to year involved the annual renewal of the contractual relationship. Further, the nontenured teacher may not be placed in the position of tenure until the offer and acceptance of the fourth consecutive contract.

Appellant claimed that she was not arguing that there is no difference between a tenured and a nontenured teacher. Appellant claims the difference goes to deciding the merits of the case and not to the jurisdiction of the county superintendent to hear the controversy. Appellant argues that controversies include nontenured teacher nonrenewals. This Superintendent disagrees.

If, for example, a board decides to dismiss a teacher under contract for no reason whatsoever during the term of that contract, the nontenured teacher has a contract right and may pursue contract and statutory remedies including an appeal to the county superintendent. Upon completion of the contract term, there exists no legal relationship between the school district and the nontenured teacher. No contractual relationship exists. No employment relationship exists. The only things that exist are the familiarity of the teacher, his or her past performance and the board of trustees' decision not to renew and issue a new teachers contract to this particular teacher. Renewal of a nontenured teacher is automatic only if notification of nonrenewal is not issued by the board to the teacher. That



is the extent of the renewal protection by statute. For very practical reasons, the legislature has provided that process. A teacher must know whether his or her contract will be renewed so he or she may seek employment elsewhere.

Prior State Superintendents have held that nontenured teachers do not have a statutory right to a hearing before the county superintendent of schools on the nonrenewal of a nontenured teachers contract. In the matter of Thomas Connolly v. School District #1 Board of Trustees, issued April 12, 1979, the then State Superintendent responding to Appellant's argument that a nontenured teacher has a right to a hearing, said in part:

To accept Appellant's premise would be to require the county superintendent to hold a full blown evidentiary hearing on the request of any terminated nontenured teacher. Viewing the statutes relating to school controversies as they hold, I conclude the legislature did not intend such a result. The statutes relating to the termination of a tenured teacher (20-4-204) and those relating to the dismissal of a teacher during the term of his contract (20-4-206) and those relating to the dismissal of a teacher during the term of his contract (20-4-207) clearly and explicitly provide for a right to a hearing. The statute pertaining to the termination of non-tenured teachers (20-4-206) does not contain any such provision. Dunphy v. Anaconda Co. 151 Mont. 76, 438 P2d 660 (1968). The express mention of a certain power implies the exclusion of nondescribed powers. State ex rel Jones v. Giles, 168 Mont. 130, 541 P2d 355 (1975). In view of these well established principles of statutory construction I conclude that the issues raised by Appellant here do not create "controversy" within the meaning of Section 20-3-210 MCA.

Appellants argue that a recent District Court decision in Jones v. Board of Trustees, #DV 81-243, Missoula County, District Court ruled that a nontenured teacher had to exhaust his administrative remedies provided under Section 20-3-210 MCA before he could file an action in district court. In Jones, the Court dismissed the case of a nontenured teacher because the teacher had failed to exhaust his administrative remedies under Section 20-3-210

MCA. In support of that decision, the District Court cited School District #12, Phillips County v. Hughes, 170 Mont. 267, 552 P2d 328 (1976). The Court's remand of school disputes through the administrative appeals procedure is correct. In Jones, however, the Court held that a non-tenured teacher who alleged that a school board had not followed the procedural requirements of Section 20-4-206 MCA could not pursue his case in district court until he applied for a hearing before the county superintendent of schools. The court based its decision on School District #12, Phillips County v. Hughes, 170 Mont. 267, 552 P2d 328 (1976). Hughes case dealt with a teacher who was dismissed during the contract term and not a nonrenewal of a contract. The Hughes case deals with a property right under contract.

Section 20-3-210 MCA provides:

Controversy appeals and hearings. (1) Furthermore, he shall hear and decide all controversies arising under:

(a) section 20-5-304 or 20-5-311 relating to the approval of tuition application; or

(b) any other provision of this title for which a procedure for resolving controversies is not expressly prescribed.

Also in Jones, the Court did not order the County Superintendent to conduct a hearing. The Court concluded:

Based on the above facts, this court concludes that as a matter of law, plaintiff is not entitled to have his cause heard in this court until he has exhausted the remedies set forth by the legislature for proceedings of this nature.

The Court denied Plaintiff's motion for summary judgment in that case. The determining issue was whether or not the court should hear that matter at that time.

The Court instructed the Plaintiff to exhaust his administrative remedies. The court did not order a county superintendent to conduct a hearing but allowed the teacher to make an appeal to the county superintendent. The

county superintendent then had to determine whether he or she may accept jurisdiction on the matter. If the County Superintendent allows the appeal but rejects jurisdiction, then the teacher may appeal the decision to the State Superintendent of Public Instruction, as was done in this case. If the State Superintendent of Public Instruction upholds the decision of the County Superintendent not to hold a hearing, then for purposes of appeal to the district court, Appellant had exhausted his or her administrative remedies. What action the Court may take in affirming, reversing and/or remanding the State Superintendent's decision back to the county superintendent would be in order at that time.

This State Superintendent has examined the differences between Section 20-4-204 and 20-4-206 MCA in conjunction with Section 20-3-210 MCA and has concluded that nonrenewal of a nontenured teacher's contract is not a controversy within the meaning of Section 20-3-210 MCA.

Since the appeal taken in this case, this State Superintendent has adopted the Uniform Rules of School Controversy for the County Superintendent and the State Superintendent of Public Instruction. See Section 10.6.101 Administrative Rules of Montana. These rules were adopted pursuant to Section 20-3-107 MCA and provide further clarification on the procedure for the County Superintendent.

Section 10.6.102 states:

School controversy means contested case (1) Contested case means any proceeding in which a determination of legal rights, duties or privileges of a party is required by law.

Section 10.6.104 states:

Jurisdiction (1) The county superintendent shall upon receipt of the Notice of Appeal, determine: (a) whether the appeal is a contested case; (b) whether he/she has jurisdiction on the matter. (2) The county superintendent may determine that he/she does not have jurisdiction or the power to act and therefore

render such determination and return such notice and order to the appealing party. The county superintendent, upon determination of proper jurisdiction and proper contested case, shall hear the appeal and take testimony in order to determine the facts related to the contested case.

In this instance, Appellant must secure the express agency ruling before seeking judicial relief.

Appellant argues that she does not seek reinstatement of this particular teacher. She argues that she is entitled to a hearing. A hearing would not change Appellant's employment status. Any hearing at all would amount to an idle act which is not required by Montana law. Section 1-3-223 MCA.

Appellant is not claiming a constitutionally protected procedural due process right. She is not arguing contract right but simply a statutory right. The issues of guaranteed tenure or property interest as expressed in the Board of Regents v. Roth, 408 US 564 (1972), and Akhtar v. Van deWetering, \_\_\_ Mont. 642 P2d 149 (1982) address those issues. Since Appellant has no vested statutory right to employment or a statutory right to a hearing, and does not argue constitutional or contractual rights, Appellant is not entitled to any further procedural consideration. The Montana Supreme Court in Chovanak v. Mathews, 120 Mont. 520, 188 P2d 582 (1948) discussed the term "controversy" within that judicial context. The case involved an action brought by a citizen to have the legislation authorizing slot machines declared unconstitutional. The district court dismissed the action. The Supreme Court affirmed and discussed what constitutes a "controversy." Citing the United States Supreme Court, the Court found that "controversy" is "one that is appropriate for judicial determination." Chovanak at 526. The court found no legal right that the Board of Equalization had denied the Appellant. The court went on to note the "Appellant's complaint is in truth against the law, not against the Board of Equalization."

This is very similar to the case on appeal. Appellant was not renewed. The fact that the Appellant does not agree with the Board's action does not create a controversy. In this case, as in Chovanak, Appellant's complaint is against the status of the law, not the board of trustee's application of that law.

A right to a hearing before the county superintendent is only allowed when a "controversy" exists. A nontenured teacher disputing a nonrenewal does not have a statutory right to a hearing before the county superintendent of schools. The County Superintendent's order is affirmed.

DATED this 21st day of March, 1983.

BEFORE THE STATE OF MONTANA  
SUPERINTENDENT OF PUBLIC INSTRUCTION

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PAMELA PAUN,

N,  
-vs- Appellant,

BOARD OF TRUSTEE  
CHOUTEAU COUNTY SCHOOL  
DISTRICT #56, CHOUTEAU  
COUNTY, MONTANA

Respondent.

and,  
LEONARD MURPHY,  
Appellant,

-vs-

BOARD OF TRUSTEES,  
HAYS LODGE POLE PUBLIC  
SCHOOLS, BLAINE CO. #50,  
Respondent.

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OSPI 31-82

DECISION AND ORDER

OSPI 27-82

Upon stipulation and motion of counsel in both cases cited above and by order of this State Superintendent, these cases have been consolidated within this Decision and Order. The Decision and Order related to the sole question on appeal: Whether "to find (or hire or get) a better teacher" is a reason sufficient to meet the non-renewal notice required by Section 20-4-206 (3) MCA.

All teachers in the above entitled cause were non-tenured teachers. Their boards of trustees decided not to renew their teachers' contracts pursuant to Section 20-4-206 MCA. The teachers in these cases allege that the reason given, "that we can find a better teacher" is not sufficient to meet the statutory requirements of Montana law.

In both cases, the County superintendent refused to conduct a hearing to decide the merits of the case. The decision to deny the appeal was similar in both cases.

Appellants also argued that nontenured teachers have a right to appeal before the County Superintendent of